

*a***PERWIRA AFFIN BANK BHD****v.****KI PRODUCTION SDN BHD***b*

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2(S5)-24-1305-1998]
13 JUNE 2000

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CIVIL PROCEDURE: *Stay of proceedings - Principles in granting stay*
- Special circumstances - What constitutes - Land having special value
- Appeal if successful rendered nugatory if land auctioned off - Merits
of appeal - Strong possibility of success on appeal

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This was the defendant's application for a stay of proceedings pending the disposal of its appeal to the Court of Appeal against a previous decision of the High Court ordering the sale of the land it had charged to the plaintiff bank. The defendant contended that the special circumstance here was that land always has a special value, and that its appeal, if successful, would be rendered nugatory if a stay was refused and the plaintiff proceeded to auction off the land.

*e***Held:***f*

[1] Land has a special value of loss which may not be adequately compensated by damages. This 'circumstance' should be considered even in the context of an application for stay within foreclosure proceedings.

[2] The defendant must show, and indeed had shown, that it has a strong possibility of success on appeal.

[Stay granted.]

*g***Case(s) referred to:**

Government of Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 (**foll**)

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 (**refd**)

Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 (**foll**)

Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 (**foll**)

*h***Legislation referred to:**

National Land Code 1965, ss. 256(3), 340, Form 16D

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For the plaintiff - Phua Jin Key; M/s Manjit Singh Sachdev, Mohammad Radzi & Partners **a**

For the defendant - Karen Kaur Bal; M/s BC Teh & Yeoh

Reported by Alex KC Lee

JUDGMENT **b**

RK Nathan J:

The Application

This is the defendant's application for a stay of all proceedings pending the disposal of the defendant's appeal to the Court of Appeal against the decision of this court given on 3 August 1999 granting an order for sale. **c**

Facts

On 16 December 1998 the plaintiff had filed an application for an order for sale of two parcels of land known as H.S.(D) 9574 Lot No. 31877 and H.S.(D) 9575 Lot No. 31878 (the said lands) by auction to recover sums due under four facilities, namely, the overdraft, a second overdraft, a bank guarantee and a term loan. On 3 August 1999 my learned brother James Foong J granted the order for sale and on 27 August 1999 the defendant filed an appeal against the said decision. **d**
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Findings Of The Court

Much has been said about the "special circumstances" approach and the "rending nugatory" approach which this court ought to consider before granting a stay of proceedings pending appeal. The Federal Court in *Government of Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 clearly laid down the law that the special circumstances approach ought to be followed. The Federal Court went on to hold at p. 706 as follows: **f**

"... there are a myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close the category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about. As long as one does not stray beyond the perimeters set by judicial principles, the discretion can be exercised. **g**
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- a* The defendant thus argued that the special circumstances particular to this case is that since land has a special value, it would render nugatory the decision of the Court of Appeal if a stay was not refused. The defendant thus argued that if a stay was not granted the plaintiff would proceed with the summons for directions and obtain an auction date and the said lands
- b* would then be sold even before the appeal is heard.

In *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476 Edgar Joseph Jr SCJ (sitting as a High Court Judge) held that “land is always deemed to have a special value of loss which may not be adequately compensated by damages”. Again, whilst this time sitting in the

c Federal Court the same learned judge said in *Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15 at 26:

not forgetting that land is always deemed in law to have a special value and is in the nature of things, absolutely limited...

- d* Therefore there is no doubt that the Federal Court has expressed its view that land has “a special value of loss which may not be adequately compensated by damages”. On this ground I am convinced that the defendant’s application ought to be seriously considered by this court. However, the plaintiff submitted that the question of land having a special
- e* value is a matter that ought to be considered only when the court has to consider a case involving a sale and purchase agreement or when the court has to consider the issue as to whether an award of specific performance or damages would suffice. He further argued that the question of land
- f* having a special value ought not to be a factor when considering a statutory right of sale in foreclosure proceedings. This is, in my view, an inappropriate submission. That land has a special value, is a matter that ought to be considered in all matters including foreclosure proceedings.

Is There Merit?

- g* But however, the issue is not just the fact that the subject matter of this appeal relates to land. The defendant must also show that it has merits in proceeding with the appeal. In considering whether there are any merits, it is not the duty of this court to determine any issues. All I have to do is to consider if the appellant/defendant has raised any issue showing that
- h* there is a strong possibility of success, on appeal.

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In this case, by a letter of offer dated 24 November 1994 the plaintiff granted the defendant the following facilities: *a*

- (1) 1st overdraft of RM360,000.
- (2) 2nd overdraft of RM400,000.
- (3) Bank guarantee of RM24,300.
- (4) Term loan of RM626,000.

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In respect of the terms and conditions, it was agreed *inter alia* that:

- (i) the defendant shall execute a 1st legal charge against the term loan of RM626,000; and *c*
- (ii) the defendant shall execute a 2nd legal charge against the 2nd overdraft of RM400,000.

In consequence thereof the defendant executed only two security documents, namely: *d*

- (i) a Form 16A together with Annexure for the term loan of RM626,000; and
- (ii) another Form 16A together with Annexure for the 2nd overdraft of RM400,000. *e*

However the plaintiff had in its Statutory Notice Form 16D included a demand in respect of all four facilities. The defendant contends that this is wrong in law since there are only two charge documents and that in the circumstances the plaintiff could at best, apply and order for sale in respect of the two charges, namely, in respect of the term loan and the 2nd overdraft. In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 MLJ 36 the Federal Court held that 'cause to the contrary' within the meaning of s. 256(3) of the National Land Code 1965 (the NLC) might be established only in three categories of cases: *f*

- (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the NLC;
- (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and *g*

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- a* (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

b Whether the defendant will be able to successfully argue its case as falling within the third category, is for the Court of Appeal to decide. The respondent/plaintiff in its submission contends that the inclusion of the two other facilities in the Statutory Notice of Demand, namely, the Form 16D, which two facilities are not part of the two charges, is a minor irregularity. This again is not for me to decide. In so far as this application for stay is concerned I am satisfied that the appellant/defendant has raised an issue that requires a stay to be granted until determination of the appeal. In the exercise of my discretion I order costs to be in the cause.

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